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8 UNITED STATES DISTRICT COURT
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10 CENTRAL DISTRICT OF CALIFORNIA

11 SPACE EXPLORATION
12 TECHNOLOGIES CORP.,

13 Plaintiff,

14 v.

15 NATIONAL LABOR RELATIONS
BOARD, et al.,

16 Defendants.
17

Case No. 2:24-cv-01352-CBM-AGR

**PLAINTIFF SPACEX'S RESPONSE TO
DEFENDANTS' NOTICE AND REQUEST
TO IMMEDIATELY RETRANSFER THIS
CASE PURSUANT TO THE FIFTH
CIRCUIT'S ORDER**

18 **PLAINTIFF SPACEX'S RESPONSE TO NOTICE**

19 Yesterday, the U.S. Court of Appeals for the Fifth Circuit held, consistent with Ninth
20 Circuit precedent, that jurisdiction over this case remains in the Fifth Circuit because the Fifth
21 Circuit administratively stayed the transfer before the clerk's office of this Court docketed the case.
22 Order, *In re SpaceX*, No. 24-40103, Dkt. No. 46-1 (5th Cir. Feb. 26, 2024) (citing *Lou v. Belzberg*,
23 834 F.2d 730, 733 (9th Cir. 1987) ("We adopt the docketing date as the time of effective
24 transfer.")). In the Fifth Circuit's words, it "still has jurisdiction over the case." *Id.* at 3.¹

25 But because the clerk's office docketed the case here despite the Fifth Circuit's timely stay
26 of the transfer, and to "maintain procedural clarity, reduce inter-circuit friction, and foster comity,"
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28 ¹ SpaceX submits this response because Defendants' tactics have left no other choice. But
submitting this response should not be construed as conceding, in any way, that this Court
currently has jurisdiction. The Fifth Circuit has already ruled that it does not.

1 the Fifth Circuit directed the Southern District of Texas to immediately request that this Court
2 return the transferred case. *Id.* at 2 n.1. By the Fifth Circuit’s own account, this procedural step
3 was out of an abundance of caution and “[i]n the interest of procedural consistency and comity,”
4 but not strictly necessary because jurisdiction over the case never vested in this Court.

5 Even so, Defendants—a federal agency and officers acting in their official capacities—now
6 make an astonishing request that this Court dispense with comity and create procedural confusion
7 and inter-circuit strife. They ask the Court to disregard a sister court’s determination of its own
8 jurisdiction and assert jurisdiction over a case that was never validly transferred. If Defendants
9 want to contest the Fifth Circuit’s jurisdictional determination, the place to do so is before the Fifth
10 Circuit. But for now, the Fifth Circuit’s ruling is the law of the case. The National Labor
11 Relations Board and its officers and counsel are subject to the Fifth Circuit’s authority and their
12 flagrant effort to thwart the Fifth Circuit’s order is, to put it mildly, grossly improper.

13 Despite Defendants’ attempts to muddle the record, the timeline is clear and the Fifth
14 Circuit’s ruling clearly correct. In an order entered on February 19, the Fifth Circuit stayed the
15 Southern District of Texas’s transfer order.² As Defendants’ Notice admits—despite being on
16 notice of the Fifth Circuit’s stay of the transfer—they continued both by telephone and in person to
17 pressure this Clerk’s Office to ignore that stay and publicly docket the case. Dkt. No. 101 n.*.
18 But, as the docket in this Court attests, the docketing did not occur until days after the stay. The
19 docket in this Court contains a “Notice of Receipt of Case Transferred In” that was generated and
20 signed on February 20—after the Fifth Circuit’s stay order. Dkt. No. 85; *see also* Dkt. No. 83.
21 The case was not actually docketed until February 23; indeed, the parties agree there was no
22 electronically available docket or final case number assignment until February 23, and this Court’s
23 docketing notations, starting with Docket Number 83, reflect that nothing was entered in the docket
24 of this Court until February 23.

25 Under Ninth Circuit precedent (which the Fifth Circuit’s ruling cited), this sequence of
26

27 ² Defendants acknowledge that the administrative stay was stamped as filed on February 19 by the
28 Fifth Circuit’s Clerk of Court, was entered on the docket on February 19, and was served on all
parties via ECF on February 19. The accompanying memorandum to counsel was also dated
February 19. The ECF header says February 20, but the actual filing date, February 19, is
undisputed.

events means that this Court lacks jurisdiction over the case. In *Lou*, the Ninth Circuit examined when its jurisdiction would be terminated after the initiation of a transfer from the Central District of California to the Southern District of New York under 28 U.S.C. § 1404. 834 F.2d at 733. The Ninth Circuit held that the transfer was not “effective” until the docketing date and that the initiation of the transfer did not strip it of jurisdiction. *Id.* (“As Lou filed her appeal on June 12, 1986, before the papers were docketed in New York, this court had already acquired appellate jurisdiction before the transfer was effective. Once jurisdiction is properly obtained by the appellate court it is not terminated by the subsequent completion of a section 1404 transfer.”). This Ninth Circuit precedent confirms that the Fifth Circuit likewise retained jurisdiction to stay the transfer order on February 19 because no docketing had yet occurred here. After that stay, later actions by this Court’s clerk’s office were ineffective at establishing jurisdiction. Binding Ninth Circuit precedent therefore compels this Court recognize the Fifth Circuit’s stay of the transfer.

Defendants’ request for briefing on this matter is unnecessary and inappropriate. Because this Court never obtained jurisdiction under binding Ninth Circuit precedent and the law of the case, it should not invite further briefing. Defendants have already filed two inappropriate and argumentative notices which do not come close to supporting their plainly erroneous position. *See* Dkt. Nos. 96 & 101. For this Court to invite briefs and decide a jurisdictional question that was already resolved would waste judicial resources and create the inter-circuit friction that the Fifth Circuit is rightly attempting to avoid. Still less should the Court delay retransfer by 10 days to allow Defendants time to seek mandamus in the Ninth Circuit. *See* Dkt. No. 101, at 3. Defendants apparently welcome the waste of resources and delay because, as they are well aware, the NLRB administrative hearing that SpaceX seeks to enjoin opens on March 5, one week from today.³ The Court should not condone Defendants’ improper stratagem.

³ Although the NLRB proceeding will open on March 5, which is a “here and now” constitutional injury to SpaceX, *see, e.g., Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023), the NLRB Administrative Law Judge at the case management conference on Friday, February 23, indicated (although as of yet there is no order setting this schedule) that (1) the trial portion of the administrative hearing would not begin until the week of May 13; (2) all subpoena-related litigation filings would be due on March 18, and (3) documents responsive to the subpoenas would be exchanged in April. Thus, although SpaceX’s constitutional injuries are ongoing, the actual trial with live witness testimony likely will not begin until the week of May 13.

1 Defendants argue that the timing supports ignoring the Fifth Circuit’s jurisdictional
2 determination. This Court should move forward, Defendants say, because Defendants currently
3 have a March 4 deadline to answer or otherwise respond to the Complaint. Dkt. No. 101, at 2.
4 SpaceX believes (particularly given this Court’s lack of jurisdiction) that there is no reason for
5 Defendants to submit a pleading or responsive motion in this Court. (SpaceX also stipulates to
6 extending Defendants’ responsive pleading deadline by 30 days to allow resolution of the venue
7 issues.) By the same token, the Court should not issue any ruling on the merits of the preliminary
8 injunction request, which will not be before this Court unless the Fifth Circuit lifts its
9 administrative stay and upholds the transfer to this Court.

10 Immediate retransfer not only respects the Fifth Circuit’s order,⁴ but also settles any
11 lingering procedural ambiguity and avoids turning this case into problem from a law school exam.
12 Nor would Defendants suffer any prejudice from that course of action. If the Fifth Circuit holds
13 that the transfer was proper, it will deny the writ of mandamus, and this Court can then assume
14 jurisdiction over the case. If the Fifth Circuit holds that transfer was in error, however,
15 Defendant’s invitation would have this Court create a jurisdictional tug-of-war and procedural
16 mess that may need sorting out in both circuits’ appellate courts, creating more unnecessary delay
17 and impeding “the just, speedy, and inexpensive determination of [this] action.” Fed. R. Civ. P. 1.

18 Defendants preemptively raised the Fifth Circuit’s ruling before the Southern District of
19 Texas had an opportunity to request this case back in compliance with that ruling. Now that
20 Defendants have done so, this Court should immediately retransfer the case to the Southern District
21 of Texas at its earliest opportunity.

23 ⁴ Although Defendants cite *Defense Distributed v. Platkin*, 617 F. Supp. 3d 213, 240 (D.N.J. 2022),
24 to argue that this Court should not respect the Fifth Circuit’s order, that case is inapplicable.
25 Unlike in that case, the Fifth Circuit here preserved its jurisdiction by staying the transfer (on
26 February 19) before the case records were received (on February 20) or docketed (on February 23)
27 in the transferee court, and thus before the transferee court could obtain jurisdiction. That is
28 precisely why the Fifth Circuit squarely held that it currently has jurisdiction over the case, unlike
in *Defense Distributed*. Defendants suggest that the administrative stay was somehow ineffective,
Dkt. No. 101 at 2, but that argument is baseless and contrary to the All Writs Act. *See* 28 U.S.C.
§ 1651 (“all courts established by Act of Congress may issue all writs necessary or appropriate in
aid of their respective jurisdictions and agreeable to the usages and principles of law.”). So, there
is even less justification here than in *Defense Distributed* to jettison comity and respect between
the federal courts.

1 Dated: February 27, 2024

MORGAN LEWIS BOCKIUS LLP

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3 By /s/ Harry I. Johnson III
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4 Attorneys for Plaintiff
5 Space Exploration Technologies Corp.
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